IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 10TH JULY 2007 / 19TH ASHADHA 1929

FAO.No. 290 of 2006()

AS.171/2006 of DISTRICT COURT, THRISSUR
OS.554/1986 of I ADDL.M.C.,THRISSUR
.....

APPELLANTS/RESPONDENTS/DEFENDANTS:
----

1. YAMUNA, D/O.KOTTAYATTIL GOVINDAN,
KUNNAMKULANGARA DESOM, CHIYYARAM VILLAGE,
THRISSUR TALUK.

2. BALASUBRAMANIAN, S/O.KOTAYATTIL SANKARAN (DIED)
KUNNAMKULANGARA DESOM, CHIYYARAM VILLAGE,
THRISSUR TALUK.

***3. SAVITHRI W/O BALASUBRAMANIAN**
KOTTAYATTIL HOUSE, KUNNAMKULANGARA DESOM
CHIYYARAM VILLAGE
THRISSUR TALUK

***4. REKHA, D/O BALASUBRAMANIAN**
KUNNAMKULANGARA DESOM, CHIYYARAM VILLAGE
THRISSUR TALUK

***5. RENU D/O BALASUBRAMANIAN**
KUNNAMKULANGARA DESOM, CHIYYARAM VILLAGE
THRISSUR TALUK

(ADDL. APPELLANTS 3 T0 5 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF THEDECEASED SECONDAPPELLANT AS PER ORDER DATED 13-06-2007 ON I.A. NO. 1622/2007)

BY ADV. SRI.JIJO PAUL

RESPONDENTS: APPELLANT/PLAINTIFF:

DASAN, S/O.THOPPIL VELU,
KURUKKANCHERY VILLAGE, DESOM,
THRISSUR TALUK.

BY (PARTY IN PERSON)

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 10/07/2007 THE COURT ON 10/07/2007 PASSED THE FOLLOWING:

ORDER IN I.A. NO. 4585 OF 2006 IN F.A.O. 290 OF 2006

DISMISSED

10-07-2007 **SD/- K.PADMANABHAN NAIR, JUDGE**

K.PADMANABHAN NAIR, J.

F.A.O No.290 of 2006

Dated this the 10th day of July 2007

JUDGMENT

The defendants in O.S No. 554/1986 on the file of the Munsiff Court, Thrissur are the appellants in this appeal. The respondent filed a suit for recovery of possession of B and C schedule properties on the strength of title. B and C schedules are stated to be part of A schedule which is described as having an area of 1 acre. According to the respondent B Schedule is having an area of 26 cents and it is situated on the western side of A schedule. C Schedule is having an area of 3 cents and it is situated on the northern side of A schedule. Alleging that the defendants trespassed into B and C schedule properties, the suit was laid for recovery of those items.

2. Originally the suit was dismissed by the trial court. The appeal filed against that decree was also dismissed. The respondent filed S.A. 854/1998 before this Court. This Court set aside the decree and judgment passed by the trial court and remanded the case for a fresh disposal in accordance with law. After the remand further evidence was taken. In fact the entire exhibits were marked again to avoid confusion. PWs1 and 2 were examined on the side of plaintiffs. DWs 1 to 3 were examined on the side of the defendants. Exts C1 to C5 are the reports

filed by 4 different Advocate Commissioners. The trial court after considering the entire evidence dismissed the suit with a compensatory cost of Rs. 2,500/- . Challenging the decre and judgment the respondent filed A.S 171/2006 before the District Court. The lower appellate court set aside the decree and judgment passed by the trial court and remanded the matter for fresh disposal in accordance with law after giving sufficient opportunity to the plaintiff to apply for a fresh commission to measure out the plaint schedule properties and the properties of the defendants separately with reference to the title deeds and survey measurements with the assistance of Taluk Surveyor. Both sides were given opportunity to adduce further evidence. Challenging the order of remand the defendants in the suit has filed this First Appeal from Orders .

3. The F.A.O was admitted on the substantial questions of law.

i. *Was not the first appellant Court in error in allowing and remanding the appeal without going into the question of title and possession of the plaintiff over the extent claimed in the plaint?*

ii. Was not the first appellant Court in error in interfering with the trial court judgment solely on the basis of Exhibit A3, when Exhibit A3 does not in any manner improve the case of the plaintiff?

iii. Was not the first appellant Court in error in not

appreciating the facts of the case, the evidence including Commission Report in the proper perspective?

4. I have heard the learned counsel appearing for the appellants and respondent who appeared in person and argued his case effectively. The learned counsel appearing for the appellants argued that the lower appellate court which is the final court of fact did not consider the pleadings and evidence of the case and simply set aside the decree and judgment and remanded the case for the sake of remand. It is argued that before directing the trial court to depute another Commissioner, the lower appellate court ought have considered whether the reports and five plans attached to Ext. C1 are correct or not. It is argued that in Ext.C1, the Commissioner had identified and located the properties in five different manner. One according to description given in the plaint. Another one as per the documents and the third one as demanded by the plaintiff at the spot. He had prepared two other plans also. It is argued that the correctness those plans upto Supreme Court but failed. It is argued that the lower appellate court did not consider as to whether any of the plans can be accepted or not. It is also argued that the remand was for the sole purpose of ascertaining the location in accordance with Ext.A3 document which brought into existence in the year 2005.

5. The properties originally belonged to to one Lilly Bhai . She got the property as per Ext.A5 Teer deed dated 12-10-1962 . She sold the

property to the plaintiff on 8-6-1978 under Ext.A1. The suit was instituted in the year 1986. As already stated initially the suit was dismissed. That decree and judgment was confirmed by the lower appellate court. This court set aside the decree and judgment and remanded the matter.

6. Thereafter voluminous evidence was adduced. Ext.C2 was a report submitted by the commissioner on 1-9-1986. Thereafter another Commissioner inspected the property on 16-3-1991 The third commissioner inspected the property on 28-6-2004 and the fourth commissioner inspected the property on 28-10-2003 and 7-4-2004. It is submitted by the counsel for the appellants that there are altogether 9 reports and 11 plans submitted by the Commissioners . It is argued that the trial court had marked only 5 but there are other reports and plans available among the records. The learned counsel appearing for the appellants has argued that Ext.A3 rectification deed was executed so as to bring the description of the property in conformity with the description given in Ext.A5. It is argued that Ext.A5 was produced long back and when Ext.C1 report was prepared that document was available in the records and the Commissioner had taken note of the description of the property as given in Ext.A5 also. It is also argued that merely because of the execution of Ext.A3, no change will be effected in the description of the property because even according to the plaintiff Ext.A3 is in tune with

Ext. A5. The respondent has appeared in person and argued that for an effective decision of the matter a further inspection by another commissioner is necessary and that is why the lower appellate court set aside the decree and judgment and remanded the matter.

7. The lower appellate court extracted the case of the parties and simply found that in order to resolve the dispute arising for consideration in the suit, the properties are to be measured out with reference to the title deeds and survey measurements. As I already stated, a number of reports and plans are available among the records. The court below has not considered whether any of the commissioners deputed by the trial court has measured out the property with reference to the title deeds and survey measurements. The lower appellate court itself had observed that there is no dispute with regard to the survey number of the properties and the dispute is only regarding the extent alone. A reading of the judgment shows that the lower appellate court abdicated the functions vested in it .It is the final court of fact. Before simply remanding the matter, the lower appellate court ought to have discussed the evidence adduced. If the lower appellate court find, with the materials on record, that it is not possible to decide the matter, the lower appellate court can remand the matter. But a remand cannot be made for the sake of remand.

8. So I have no other option but to set aside the judgment and decree passed by the lower appellate court and direct the lower appellate court to re-hear the appeal and take a fresh decision in the matter in accordance with law.

9. I make it clear that I have not considered the merits of the contention raised by either sides. If the lower appellate court, after appreciating the evidence on record, is of the opinion that a remand is inevitable in the case it may remand the case. But before the order of remand it is appropriate that the lower appellate court shall consider the evidence on record properly and then take a decision .

10. In the result the F.A.O is allowed. The judgment of the Lower Appellate Court dated 10-11-2006 is hereby set aside. The lower appellate court is directed to take A.S. 171/2006 back to file and dispose of the same afresh in accordance with law after hearing both sides. The parties shall appear before the lower appellate court on 8-8-2007

K.PADMANABHAN NAIR,JUDGE

es